

THE “ILLEGAL MIGRANT” AND “REFUGEE” STATUS DILEMMA: A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO THE ROHINGYA MUSLIMS IN INDIA

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It took a writ petition under Art.21 of the Constitution of India presented before the apex court by two Rohingya Muslims namely *Mohammad Salimullah* and *Mohammad Shaqir* to bring the plight of refugees into focus and make it national news. However, the constitutional conscience of the Indian polity has never been awakened even though 70 years ago 20 million people became refugees on either side of the Indo-Pak border. Legally speaking, not being a party to the UN *Refugee Convention* of 1951 and its *Additional Protocol* of 1967 has hurt India badly in terms of granting refugee status to illegal migrants and in understanding that the transition from illegal migrant status to citizenship status is basically a step by step process. However, the major question that one may ask is “*Whether the successive Indian governments over the years have ever bothered to think about illegal migrants and grant them refugee status?*”. The answer unfortunately is in the negative. However, before understanding the issue and trying to search for solutions, it is imperative that one delves into the background of this menace by looking at both the international and domestic perspectives.

The concepts of Migrant, Immigrant, Internally Displaced and Refugee in International Law

Ordinarily, the term “*Migrant*” denotes a person who moves around from one place to another within the same country in search of better work and better living conditions. An “*immigrant*” is one who migrates from one country to another in search of better job opportunities and better living conditions. An “*Internally Displaced*” person is defined under International Humanitarian Law as a person who is displaced from his original shelter due to war, armed conflict, any natural or man-made disaster. Finally, the term “*Refugee*” is defined in the *United Nations Convention Relating to the Status of Refugees, 1951* as a person who has been staying outside the country of his nationality or that of habitual residence, i.e. domicile, as a result of

the fear of persecution and is unable to return to the country because of the fear. It is noteworthy that such persons are also alternatively known as “*Asylum Seekers*”. Asylum seekers are those who seek international protection from another state because of the fear of persecution in their own country. People who are granted Asylum by the country which has been asked to do so become refugees whereas those who are not recognized as such remain illegal migrants/immigrants. Asylum is generally granted only when there is a “*well-founded*”¹ fear of persecution and also in furtherance of the principle of “*Non-Refoulement*”² in International Refugee Law. Among all countries which have had an influx of refugees in the last century, India is leading the pack with around 20 million refugees living in this country. The first such instance which saw the forceful migration of millions of people into the country was during the Indo-Pak partition in 1947 when a lot of families lost their shelter and were forced to relocate depending on whether they were Hindus or Muslims. In this context, one needs to look at the history of the refugee issue in India in order to understand the root causes of this issue.

History of the Indian refugees

India is one of the few countries to experience the refugee situation in the last half century. Indian history is evident by large-scale migration of people from different countries. These migrations had taken place in 2 ways- across the Hindukush Mountains in the West and the Patkoi range in the East. After Independence, the first twenty-five years were spent on accepting the responsibility of 20 million refugees. This was due to the partition of India and Pakistan. As a result, India had to confront a task by providing relief to the displaced persons from West Pakistan. At the initial stage 160 relief camps were organized, and the total expenditure incurred was Rs. 60 crores approximately. There were many steps taken by the government of India to overcome the refugee influx. The first major step taken after

¹ What is well-founded varies from case to case but is generally understood as the proof of fear backed up with solid factual evidence on the basis of incidents of persecution that a particular group of refugees may have faced in the recent past and that may have been discovered through media reports, legislative and executive action etc.

² This is explained in Art. 33 of the UN Convention Relating to the Status of Refugees, 1951 which provides that “*No Contracting State shall expel or return (“refoule”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion...*”

independence in dealing with this issue was the enactment and entry into force of the *Rehabilitation Finance Administration Act, 1948*³.

India had to face another refugee influx in 1959 when Dalai Lama along with his followers fled from Tibet and reached India. The government of India provided Dalai Lama and his followers a political asylum⁴. The refugee influx continued in 1971 when 10 million refugees fled from East Pakistan to India during and immediately after the Indo-Pak war. For this asylum, India was forced by the humanitarian obligation to give shelter to the refugees.

After some gap, India was again affected by the influx of refugees from Sri Lanka and Bangladesh in 1983 and 1986. As per the World Refugee Report, India hosted approximately 400,000 refugees along with at least 2,000,000 refugees and some 237,000 internally displaced persons.

Protection granted to the asylum people in India

Treatment given to the asylum people were divided into three heads:

- (a) National treatment
 - (b) Treatment that is accorded to foreigners
 - (c) Special treatment.
- **National Treatment:** The national treatment to the asylum people is same as the citizens of India. There are certain Articles in the Constitution of India, which takes care of the Fundamental Rights of all people in India. The rights such as equal protection to law under article 14, religious freedom under article 25, the right to life

³ This piece of legislation was enacted to provide financial support for rehabilitation and resettlement of people who were displaced to the Indian side post-partition. Under the Act an authority called the rehabilitation finance administration was formed under the direct supervision and control of the then central government which was supposed to lend money to the displaced individuals and families so that they could arrange for their basic needs such as food, clothing and shelter by starting a new industry or business. The authority also received financial support from the government for easier disbursement of loans. For the sake of transparency and accountability to the government, the rehabilitation finance administration had to maintain proper books of accounts and was registered as a company with a common seal and perpetual succession.

⁴ This is a remedy prescribed by Art.14 of the *Universal Declaration of Human Rights (UDHR)* and the Refugee Convention of 1951 which implies that any person who fears adverse consequences or threat to life in his or her own country and cannot continue to live there under any circumstances may seek refuge or shelter in another country provided the government of the country where asylum is sought gives permission to reside in that particular country.

and personal liberty under article 21, right to social security and educational rights are guaranteed in Part III of the Indian Constitution.

- **Treatment that is accorded to foreigners:** – Under this head, there are rights which are related to the housing problems, movements, etc. the rights which are provided under this treatment are: right to employment or profession under article 17, freedom of residence and movement under article 26, right to housing under article 21, right to form association under article 15 and right to property under article 13 of the 1951 Refugee Convention.
- **Special treatment:** – This treatment includes the identity and travel document under article 28, exemption from penalties under article 3(1) of the 1951 Refugee Convention.